IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN SAMLIN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

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STATEMENT OF THE CASE.

John Samlin, the plaintiff in error herein, hereafter referred to as the defendant, was informed against in the District Court of the United States for the District of Montana, by an information filed therein May 7th, 1921. The information in substance charges: "That on or about the 19th day of March, 1921, John Samlin * * * at 211 N. 6th Street in the City of Miles City, * * * District of Montana * * * did then and there maintain a common nuisance, that is to say a building where intoxicating liquor, to-wit, whiskey, was kept and sold in violation of Title II of the National Prohibition Act, the maintaining of said common nuisance being then and there prohibited and unlawful; contrary etc." (Trans. page 2).

To this information a plea of not guilty was entered by the defendant (Trans. page 4). Thereafter the cause came on for trial on the charge contained in said information before the court and a jury (Trans. pages 5 and 6), and on July 13th, 1921, the jury returned a verdict in said case as follows:

> "We, the jury in the above entitled cause, find the defendant guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey, on the 11th and 19th of March, 1921." (Trans. page 7).

Upon said verdict the court entered judgment, which, omitting formal parts is as follows:

> "The defendant was thereupon duly informed

> by the Court of the nature of the charge against him *as appears in the information herein*, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey. * * * That whereas the said defendant having been duly convicted in this court of the offense of unlawfully selling intoxicating liquor, to-wit, whiskey, in violation of the National Prohibition Act, committed on the 11th and 19th days of March, 1921, at Miles City, in the State and District of Montana," etc.

and the defendant thereupon was sentenced to five months in the County jail and to pay the costs (Trans. pages 7 and 8).

Thereafter a petition for writ of error was filed (Trans. pages 9-10), together with assignments of error (Trans. pages 10-12), and a writ of error duly allowed (Trans. page 13); a bond was duly filed (Trans. pages 14-16); a writ of error duly issued Trans. pages 17-18); citation of writ of error (Trans. pages 19-20); and the answer in the District Court to writ of error (Trans. pages 18-19).

Upon this record plaintiff in error seeks a reversal of said judgment.

SPECIFICATIONS OF ERROR.

No. 1.—That the verdict of the jury is contrary to law.

No. 2.—That the verdict of the jury herein finds defendant guilty of a crime not alleged in the information herein.

No. 3.—That the information herein charges the defendant with having on or about the 19th day of March, 1921, in the State and District of Montana, and within the jurisdiction of said court, at 211 North Sixth Street in the City of Miles City, county of Custer, in said State and District of Montana, maintained a common nuisance, that is to say, a building wherein intoxicating liquor, to-wit, whiskey, was kept and sold in violation of Title II of the National Prohibition Act, and the jury by its verdict in the above entitled court and cause found defendant guilty of selling whiskey in violation of the National Prohibition Act, and the judgment rendered and entered herein on said verdict convicts defendant of the crime of selling whiskey in violation of the National Prohibition Act, of which crime he was so found guilty by said verdict and the judgment of the court said defendant was not on trial nor charged therewith.

No. 4.—That the Court erred in entering judgment herein in favor of the United States and against the defendant.

No. 5.—That the Court erred in pronouncing sen-

tence upon said defendant and rendering and entering judgment against him herein.

No. 6.—That the Court erred in not discharging defendant after it received the verdict of the jury herein.

ARGUMENT.

The specifications of error may very properly be considered together, as the questions involved can be said to be the same.

This case is one charged under Section 21 of the National Prohibition Act, which provides:

> "Any room, house, building, boat, vehicle, structure or place wherein intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both." * * * *

and the information only charges defendant with a violation of said section by the use of the words

> "did then and there maintain a common nuisance, that is to say, a building where intoxi-

cating liquor, to-wit, whiskey, was kept and sold" * * * *

The verdict finds defendant guilty of the crime of selling whiskey on two specific dates, but does not fix the place of such sales anywhere within the jurisdiction of the trial court, or elsewhere.

The selling of intoxicating liquor is forbidden by sections 3, 6 and 10 of the National Prohibition Act and the penalty for a violation of any of said sections and the nature of the offense thereunder are vastly different from any penalty, under section 21, or the nature of the crime committed by violating said section 21. Under section 21 a defendant who is convicted thereunder is only guilty of a misdemeanor for each violation thereof, even though the violations should run into the hundreds in number. Whereas on the other hand for the first violation of sections 3, 6 or 10, the punishment of the crime under § 29 makes it a misdemeanor, with a different punishment therefor than that prescribed by section 21, and for a second or subsequent offense of sections 3, 6 or 10 by the same party the crime is a felony under its terms, for it may be punished by imprisonment of not less than one month nor more than five years, thus coming within the definition of a felony under

§ 335 U. S. Crim. Code; §10509 U. S. Compl. St. 1916.

It may be contended that the verdict convicts the

defendant of a lesser crime which is necessarily included in the greater, and that the crime of selling is such a lesser offense which is included in a greater crime, to-wit, the maintaining of a nuisance But the question as to whether such is the case has been very ably passed upon in the case of Poole vs. U. S. 273 Fed. 623, 624, by the U. S. District Court for Montana. In the Poole case defendant was charged with three violations of the National Prohibition Act, to-wit, (1) under § 6 for manufacturing liquor without a permit, (2) under § 10 for failing to make a permanent record of such liquor, and (3) under § 18 for possession of property designed to manufacture liquor intended for use in violation of said Act. Defendant Poole in said case contended that the separate offenses were but one because the three things were in reality one continuous transaction. As to such contention of Poole, Judge Bourquin said:

> "That the separate offenses are but one, and subject to but one penalty, is an unwarranted assumption. Congress having power to define offenses, to determine what acts shall constitute offenses, has declared clearly enough that these are separate offenses. See Morgon vs. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling vs. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151. Neither is necessarily or at all included in any of the others."

Again, in the case of Dusold vs. U. S., 270 Fed. 574, the Circuit Court of Appeals for the Seventh Circuit recognizes that the various acts prohibited by the different sections of the National Prohibition Act are separate and distinct offenses, and that the various sections are in no manner dependent upon one another, saying:

> "Certainly, one section cannot be limited in its application to instances referred to in another section where the former is more comprehensive than the instances enumerated in the latter."

In the information in the case at bar Samlin was only accused of maintaining a nuisance and in no manner is it said he was the person who sold any liquor. The verdict finding Samlin guilty of selling liquor in no manner responds to the charge contained in the information and the trial court should not have received it or pronounced sentence upon it.

The anomalous condition is therefore presented that defendant is charged with one offense, found guilty of and punished for another offense entirely different.

Such a judgment cannot be sustained in the light of Article VI, amendments to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."

The Supreme Court of the United States in passing upon this constitutional provision has said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States vs. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States vs. Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient

in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

U. S. vs. Cruikshank, 92 U. S. 542, 558.

Again, the same court has expressed the rule as to criminal pleadings, viz:

"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc. sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute."

U. S. vs. Simmons, 96 U. S. 360, 362.

The rule laid down by the Supreme Court in construing the 6th Amendment to the Constitution is so well known that it requires no further citation of authority or comment. We submit there is nothing in the record before us which shows that Samlin was ever charged in any manner whatsoever with the sale of liquor and if he is hereafter prosecuted he has not a record wherein he can plead a prior judgment of conviction for the sale of intoxicating liquor, for the information is silent as to who sold the liquor in the place it is alleged that Samlin maintained as a nuisance and the verdict makes no mention of the place where the sales he was found guilty of were made. This condition of the judgment in this case would render ineffectual any attempt on his part to plead a former jeopardy.

Under this provision of the Constitution Samlin was entitled to know what he was charged with so as to prepare a defense. He was charged with maintaining the premises in question in such a manner that the same was a nuisance within the purview of Section 21 of the Volstead Act, but nothing was alleged in the information that he, himself, either sold or caused to be sold, any intoxicating liquor therein. Such a charge as he was confronted with only required him to defend himself by showing that the premises was not a place maintained by him where liquor was kept and sold. Without a single allegation that he sold, or caused to be sold, some kind of

intoxicating liquor, there was no reason for him to even suspect that the government would produce witnesses that he, himself, had made illegal sales. In a case such as this the distinction between the crime of maintaining a nuisance and selling intoxicating liquor should be borne in mind. It is perhaps best expressed in the case of U. S. vs. Cohen, 268 Fed. 420-424, where the court said:

> "It is not the crime of selling the liquor, or selling of a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereat of unlawful or criminal acts, which constitutes the nuisance."

With this distinction in mind as so well stated in the words of the court last cited it cannot be seriously contended that the maintaining of a nuisance is a crime of such a higher degree as to include the lesser one of selling liquor.

One who is charged with the offense of selling liquor in violation of the National Prohibition Act is entitled to know by the allegations of the information as to the kind of a sale it is claimed he made in violation of law. Section 3 of the Act forbids the sale of liquor except as authorized by the Act itself. Having before us for consideration only that liquor which is called whiskey, Section 4 of the Act does not

apply, hence we are confined to Sections 6 and 10 of the Act and must suppose that it was a violation of one or the other of said last named sections for which Samlin has been found guilty by the verdict of the jury. Sales of liquor under permits for certain purposes permitted by the Act are entirely legal and it was the express intention of Congress to permit certain kinds of sales. The Eighteenth Amendment to the Constitution merely forbids the manufacture, sale and transportation of intoxicating liquor in the United States for beverage purposes. Can it be said from a reading of the verdict that Samlin sold whiskey "without first obtaining a permit from the Commissioner so to do" as forbidden by Section 6, or did he sell whiskey "without making at the time a permanent record thereof showing in detail the amount and kind of liquor sold" as forbidden by section 10. If Samlin had been charged with selling without a permit it may be that he could have shown a permit upon the trial or if charged with selling and failing to keep a record thereof he may have been able to produce such a record. Neither the permit nor the record would have been competent upon the charge of maintaining a nuisance, that is conducting a place for the doing of unlawful and criminal acts therein. Further Samlin could well have been guilty of selling whiskey on the 11th and 19th days of March, 1921, upon the streets of Miles City, Montana, San Francisco, California, or any other place he happened to be at and such sales would not make him guilty of maintaining

a nuisance under Section 21 for he would not at the time of such sales upon the streets be maintaining a place where liquor was kept and sold.

In 22 Cyc. at page 468, the rule is laid down that a conviction cannot be had of a crime attempted to be included in the offense specifically charged unless the indictment in describing the major offense contains all the essential averments of the lesser crime, or the greater offense necessarily includes all the essential ingredients of the lesser and that upon an indictment charging burglary and larceny the larceny must be well laid in order to support the offense for larceny.

Again in 22 Cyc., page 467, the rule is laid down that it is necessary in the statement of the graver offense in the indictment or information to allege all the essentials of the lesser charge.

A defendant cannot be charged with one crime and convicted of another merely because the other crime is brought out and developed by the proof on the trial of the crime charged, which proof though failing to establish the crime charged does show the commission of another offense by the defendant.

Hendrey vs. U. S., 233 Fed. 5; 16 Corpus Juris, page 1103, Sec. 2587.

Considering this case at every possible point of view one is impelled to arrive at the unavoidable conclusion that the verdict is a nullity and is in no manner responsive to the offense charged in the information

herein. A verdict which finds the defendant guilty in manner and form as charged in the indictment or information is sufficient provided the offense is alleged properly in the indictment or information but where the verdict is a special verdict and is in no manner responsive to the charge contained in the information it must state all of the facts and circumstances which constitute the offense that the defendant is found guilty of. If the verdict in this case can be said to be a verdict at all it is nothing more than a special verdict arrived at by the jury and the same must contain either in itself or by reference to the information every element of the offense which the verdict says the defendant is guilty of.

State vs. Hanner, 143 N. C. 632; 24 L. R. A. (N. S.) 1-78

Patterson vs. U. S. 2 Wheaton 221; 4 U. S. (L. Ed.) 224

Holmes vs. State, 78 N. W. 641

16 C. J. page 1102

People vs. Cummings, 49 Pac. 576, 117 Cal. 497

State vs. Pollack, 79 S. W. 980

State vs. Modlin, 95 S. W. 345

Peters vs. U. S., 94 Fed. 127.

The subject of special verdicts is very fully discussed in the case of State vs. Hanner, 143 N. C. 632;

57 S. E. 154; and in a most elaborate footnote to said case, which is also reported in Volume 24 L. R. A. (N. S.) pages 1 to 78, the rule is laid down and supported by the weight of authority as follows:

> "A special verdict in a criminal case must include all the essential elements of the offense charged, or there can be no conviction."
>
> 24 L. R. A. (N. S.) Notes on pages 12-15

Again the footnote, in the Hanner case, on pages 43-44 of 24 L. R. A. (N. S.) states the rule of special verdicts to be:

> "If the findings of a special verdict in a criminal case are not responsive to the allegations of the indictment, they will not sustain a judgment."

The rules we have just quoted from the footnotes to the Hanner case in 24 L. R. A. (N. S.) are supported by a long line of the authorities and a reading of that footnote without even referring to the specific cases cited therein will convince anyone of the correctness of our contentions. We expressly refrain from making this brief longer by repeating herein the cases cited in the footnote as this court will naturally prefer its own reading of the Hanner case and said footnote in the original.

It is of course most elementary that the venue of every crime must be alleged and proven in a criminal case. In the present case there is not a single ref-

erence in the verdict to the information on file herein, hence it cannot be said that the sales mentioned in the verdict took place at Miles City, Montana, where the nuisance is alleged to have been maintained, nor does the verdict itself state where said sales occurred and the venue of the sales not having been alleged in the information itself it should have been found by the jury in its verdict.

> Commonwealth vs. Call, 21 Pick. (Mass.) 509.

The most casual examination of the record shows that the judgment itself which was entered upon the verdict not only pronounces sentence upon the defendant for a conviction of a crime that he has not been found guilty of, but indeed goes so far as to say that he is sentenced upon a verdict which found him guilty of an offense that he was not charged with. On page 7 of the Transcript the judgment recites:

> "The defendant was thereupon duly informed by the court of the nature of the charge against him as appears in the information herein."

A reference to the information herein on page 2 of the Transcript shows that the nature of the charge against him was the maintenance of a nuisance. The judgment then proceeds to recite:

> "and of his arraignment, and plea of not guilty, and of his trial and the verdict of the

jury of guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey."

The judgment further recites as appears on page 8 of the Transcript:

> "That whereas said defendant having been duly convicted in this court of the offense of unlawfully selling intoxicating liquor, to-wit, whiskey, in violation of the National Prohibition Act, committed on the 11th and 19th days of March, 1921, at Miles City, in the State and District of Montana."
>
> "It is therefore considered, ordered and adjudged that for said offense you, the said John Samlin, be confined and imprisoned in the County jail at Helena, Montana, for a period of five months," etc.

Such a judgment, completely filled as it is with contradictory and inconsistent statements based upon a verdict which is not general in its finding of guilty of the offense alleged in the information and by reason of failing to recite the place of sales does not show the venue, is a void judgment and of no force and effect. How can it be said in reading that part of the judgment where it recites:

> "That for such offense you, the said John Samlin, be confined and imprisoned," etc.,

whether it refers to a violation of section 21 as al-

leged in the information, or Sections 3, 6 and 10, which would be the only basis for a judgment upon the verdict herein.

It is most respectfully submitted that the judgment herein should be reversed for the errors complained of.

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